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No. _____

In The

Supreme Court of the United States

October Term, 1988

ANTHONY RISH,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Appellate and Supreme Courts of the State of Connecticut have violated the due process clause of the Fourteenth Amendment by holding that a defendant in a criminal case has no right to the disclosure of exculpatory information prior to trial.

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PETITION FOR A WRIT OF CERTIORARI

Anthony Rish, Petitioner, requests that a writ of certiorari issue to review the judgments and opinion of the Connecticut Appellate Court entered February 7, 1989, on which the Connecticut Supreme Court denied a petition for certification on appeal on April 13, 1989.

OPINION BELOW

The opinion of the Appellate Court of Connecticut is officially reported at 17 Conn. App. 447 (1989). It is reproduced in the Appendix to this Petition beginning at App. p. A-1.

A timely petition for certification was denied by the Connecticut Supreme Court on April 13, 1989. That order was published on May 23, 1989, at 211 Conn. 802, and it is reproduced in the Appendix to this Petition beginning at App. p. B-1.

JURISDICTION

The judgments of the Connecticut Appellate Court, affirming Petitioner's two simultaneous convictions of a total of two counts of sexual assault in the second degree and two counts of risk of injury to a minor were entered in a single opinion on February 7, 1989. A timely Petition to certify an appeal was filed with the Connecticut Supreme Court and denied by that Court on April 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part: "Nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

2. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. Section 53-21 of the Connecticut General Statutes provides as follows: "Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

4. Section 53a-71(a) (1) of the Connecticut General Statutes provides as follows: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is . . . under sixteen years of age. . . ."

STATEMENT OF THE CASE

In two companion cases, Anthony Rish, the Petitioner here, pled guilty under the doctrine of *North Carolina v. Alford*, 400 U.S. 25, 29 (1970), to one count of sexual assault in the second degree and one count of risk of

injury to a minor in each of the cases. Subsequent to these pleas, Petitioner changed counsel and moved to withdraw his pleas on a variety of grounds which are set forth in the opinion of the Connecticut Appellate Court. At the hearing on that motion, it was disclosed for the first time that the prosecutor had withheld exculpatory information which would have significantly undermined the credibility of an important prosecution witness. Petitioner immediately, with permission of the Court, orally amended his motion by adding the withholding of exculpatory information as a new ground, contending that he would not have pled guilty had he realized that the prosecution witness was capable of being impeached in the manner disclosed by this evidence. Specifically, the evidence showed that a key prosecution witness had been prosecuted in juvenile court during the pendency of Petitioner's case and was at that very time in a program under Court supervision. Petitioner argued that his guilty pleas were infected by due process violations in that they were entered in ignorance of this critical information which should have been disclosed to him pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The Court denied the motion, imposed sentence, and Petitioner appealed.

Affirming the judgment below, the Connecticut Appellate Court expressly held that although the evidence in question was exculpatory, there is no requirement that exculpatory information affecting the credibility of a prosecution witness be disclosed prior to trial: "The defendant is not entitled to impeachment evidence about a State's witness *until* the witness has been

called by the State and has testified on direct examination." 17 Conn. App. 447 at 458. (Emphasis in original.) The Court relied on a provision of the Connecticut Practice Book, which regulates procedural matters in all Connecticut courts, which provides in full as follows: "After a witness called by the State has testified on direct examination, the prosecuting authority shall disclose any record of felony convictions of the witness known to the prosecuting authority and any record of felony or misdemeanor charges pending against the witness known to the prosecuting authority."

This issue was raised by a petition to the Connecticut Supreme Court to certify an appeal, but the Connecticut Supreme Court denied that petition.

REASONS FOR GRANTING THE WRIT

The Appellate Court's reliance on a provision of the Connecticut Practice Book in this case demonstrates that its holding extends far beyond the confines of this one matter and applies to all criminal prosecutions in the State of Connecticut. That holding is clearly contrary to established federal law and results in unfair trials in Connecticut in every criminal case in which a prosecutor possesses exculpatory information. Unless this Court intervenes, exculpatory information affecting the credibility of prosecution witnesses will never be disclosed until the conclusion of direct examination of such witnesses at trial, making the exculpatory information virtually useless to most defendants. The policy announced in this case invites, if it does not guarantee, ineffective

assistance of counsel. Defense lawyers will be under intense pressure to proceed immediately with cross-examination upon receiving the exculpatory information, making that information useless in most cases. It is a rare defense attorney in this era of overcrowded criminal court dockets, who would have the temerity to request an adjournment long enough to complete the investigation, research and thinking necessary to make effective use of such impeaching evidence. It is even a rarer lawyer who will have such a request granted by busy judges attempting to cope with enormous dockets.

When this Court held in *Giglio, supra,* and *Brady, supra,* that exculpatory information of this kind must be disclosed to the defense, it presumably intended that such information be disclosed at a time when it can be useful. To hold, as Connecticut now has held, that such information is to be concealed from the defendant until literally moments before cross-examination begins is in most cases the functional equivalent of holding that it need not be disclosed at all. Every trial lawyer knows this and it is for just that reason that the lower federal courts have held consistently that such information must be disclosed at a time when it can be useful to the accused – a time when defense counsel can investigate the information and integrate it into a meaningful defense. *E.g., United States v. Polisi,* 416 F.2d 573, 578 (2d Cir. 1969); *United States v. Kaplan,* 554 F.2d 577, 580 (3d Cir. 1977); *United States v. Baxter,* 492 F.2d 150, 173-74 (9th Cir. 1973), *cert. denied,* 417 U.S. 940 (1974); *United States v. Pallock,* 534 F.2d 964, 973 (D.C.Cir.), *cert. denied,* 429 U.S. 924 (1976). See also, *Grant v. Aldredge,* 498 F.2d 376, 381-82 (2d Cir. 1974).

It is particularly disturbing that, as in this case, an accused person should be permitted to plead guilty under the *Alford* doctrine, which is based upon a considered judgment that the evidence at trial makes conviction probable, without being informed of information which would undermine the credibility of prosecution witnesses and thus reduce the likelihood of conviction. The Texas Court of Criminal Appeals has held "as a matter of law" that a guilty plea entered in ignorance of such information "was not knowingly and intelligently made." *Ex parte Lewis*, 26 Cr.L. 2216 (Tex. Crim. App. 1979). See also, *Caputo v. Henderson*, 541 F.2d 979 (2d Cir. 1976); *United States v. Schubert*, 728 F.2d 1364 (11th Cir. 1984).

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1988

ANTHONY RISH,

Petitioner

- vs -

STATE OF CONNECTICUT,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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APPENDIX A

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APPENDIX B

(Order on Petition for Certification to Appeal), 211 Conn. 802 (Apr. 13, 1989) B-1

STATE OF CONNECTICUT *v.* ANTHONY RISH
(6748)
(6749)

DUPONT, C.J., SPALLONE and FOTI, Js.

Convicted following pleas of guilty to two counts of the crime of sexual assault in the second degree and two counts of the crime of risk of injury to a child, the defendant appealed to this court claiming that the trial court erred in denying his motions to withdraw his pleas. *Held:*

1. The defendant could not prevail on his claim that, since he had not been informed of the amount of fines that could be imposed for the crimes charged, he had not been advised of the maximum possible sentences as required by the rules of practice (§ 711 [4]); the trial court had advised the defendant that he would be allowed to withdraw his plea agreement, which did not contemplate fines, were not followed.

2. Notwithstanding the fact that the defendant responded in one word answers – yes or no – to the trial court's plea canvass, the transcript of that canvas unequivocally demonstrated that the pleas were entered intelligently, knowingly and voluntarily.

3. The trial court did not err in refusing to conduct an evidentiary hearing on the defendant's claim that his pleas were the result of ineffective assistance of counsel; the basis of that claim – that the defendant's counsel had failed to inform him that a guilty plea under the *Alford* doctrine would constitute an admission in a collateral civil proceeding – was contrary to law.

4. The defendant could not prevail on his claim that the states' failure to disclose to him before he entered his pleas certain information that would have tended to impeach a potential state's witness rendered his pleas

involuntary; the defendant was not entitled to that information until after the witness testified.

5. The defendant's claim that he should have been allowed to withdraw his plea because the state would not have suffered any prejudice as a result was unavailing; the defendant failed to show a sufficient reason for withdrawal, which showing was required before an inquiry into possible prejudice to the state became necessary.

Argued October 7, 1988 –
decision released February 7, 1989

Substitute information in each case charging the defendant with the crimes of sexual assault in the second degree and injury or risk of injury to a child, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and presented to the court, *Quinn*, J., on pleas of guilty; thereafter, the court rendered judgment of guilty in each case, from which the defendant appealed to this court. *No error.*

John R. Williams, with whom, on the brief, was *Alok Ahuja*, law student intern, for the appellant (defendant).

Mitchell S. Brody, deputy assistant state's attorney, with whom, on the brief, was *Jane Emons*, former assistant state's attorney, for the appellee (state).

DUPONT, C.J. In two companion cases, the defendant appeals from the denial by the trial court of his motions to withdraw his pleas entered pursuant to the *Alford* doctrine.[1]

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[1] A plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), allows a defendant in a criminal case to consent to punishment as if he were guilty without an express acknowledgement of guilt.

In the first case, the defendant was charged with one count of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1)[2] and one count of risk of injury to a minor in violation of General Statutes § 53-21.[3] The state claimed that the defendant had sexual intercourse with the minor victim on a regular basis, from 1980, when she was eight years old, to 1986. In the second case, the defendant was charged with one count each of a violation of the same statutes. This charge concerned the five year old cousin of the first victim.

After the trial court was satisfied that there was a sufficient factual basis for the pleas; Practice Book § 713;[4] and had canvassed the defendant pursuant to Practice Book §§ 711 and 712,[5] it accepted the defendant's pleas.

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[2] General Statutes § 53a-71 provides in pertinent part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under sixteen years of age . . . ."

[3] General Statutes § 53-21 provides in pertinent part: "Any person who willfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that . . . its morals [are] likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

[4] "[Practice Book] Sec. 713. [PLEA OF GUILTY OR NOLO CONTENDERE-ACCEPTANCE] – – FACTUAL BASIS

"The judicial authority shall not accept a plea of guilty unless he is satisfied that there is a factual basis for the plea."

[5] "[Practice Book] Sec. 711. – – ADVICE TO DEFENDANT

"The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he fully understands:

(Continued on following page)

The court entered findings of guilty as to each count and set a sentencing date. Prior to the sentencing date, the defendants secured new counsel and filed written motions to withdraw his pleas pursuant to Practice Book

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(Continued from previous page)

"(1) The nature of the charge to which the plea is offered;

"(2) The mandatory minimum sentence, if any;

"(3) The fact that the statute for the particular offense does not permit the sentence to be suspended;

"(4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and

"(5) The fact that he has the right to plead not guilty or to persist in that plea if it has already been made, and the fact that he has the right to be tried by a jury or a judge and that at that trial he has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself.

"[Practice Book] Sec. 712. [PLEA OF GUILTY OR NOLO CONTENDERE – ACCEPTANCE] – – INSURING THAT THE PLEA IS VOLUNTARY

"The judicial authority shall not accept a plea of guilty or nolo contendere without first determining, by addressing the defendant personally in open court, that the plea is voluntary and is not the result of force or threats or of promises apart from a plea agreement. The judicial authority shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecuting attorney and the defendant or his counsel."

§§ 720 and 721,[6] which the trial court denied. The defendant was sentenced on all four counts to a total effective sentence of ten years, to be suspended after six years, with five years probation. A condition of his probation was that he receive psychiatric counseling and sex offender treatment.

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[6] "[Practice Book] Sec. 720. – WHEN ALLOWED

"A defendant may withdraw his plea of guilty or nolo contendere as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his plea upon proof of one of the grounds in Sec. 721. A defendant may not withdraw his plea after the conclusion of the proceeding at which the sentence was imposed."

"[Practice Book] Sec. 721. – GROUNDS

"The grounds for allowing the defendant to withdraw his plea of guilty after acceptance are as follows:

"(1) The plea was accepted without substantial compliance with Sec. 711;

"(2) The plea was involuntary, or it was entered without knowledge of the nature of the change or without knowledge that the sentence actually imposed could be imposed;

"(3) The sentence exceeds that specified in a plea agreement which had been previously accepted, or in a plea agreement the court had deferred its decision to accept or reject the agreement at the time the plea of guilty was entered;

"(4) The plea resulted from the denial of effective assistance of counsel;

"(5) There was no factual basis for the plea; or

"(6) The plea either was not entered by a person authorized to act for a corporate defendant or was not subsequently ratified by a corporate defendant."

On appeal, the defendant claims that the trial court erred in denying the motions to withdraw his Alford pleas because (1) he was not informed of the precise amount of the fines that could be imposed for violations of General Statutes § 53-21, and therefore the court failed to determined that he fully understood the maximum possible sentence on the charge, (2) the trial court failed to elicit anything more than simple "yes" and "no" responses from the defendant during the plea canvass, (3) the trial court refused to find that the defendant's pleas resulted from denial of effective assistance of counsel pursuant to Practice Book § 721 (4), (4) the pleas were not knowingly and intelligently made because they were entered without the knowledge that a potential witness for the state was in custody, and (5) the trial court failed to permit the pleas to be withdrawn although there was no evidence that the state would have suffered any prejudice.

A guilty plea, once accepted, cannot be withdrawn except with the permission of the court, within its sound discretion, and a denial of a motion to withdraw a plea is reversible only if it appears that there has been an abuse of discretion. *Szarwak v. Warden*, 167 Conn. 10, 23, 355 A.2d 49 (1974). The defendant bears the burden of showing a plausible reason for the withdrawal of a plea of guilty. *State v. Battle*, 170 Conn. 469, 475-76, 365 A.2d 1100 (1976); *State v. Slater*, 169 Conn. 38, 46, 362 A.2d 499 (1975). A trial court is required to permit the withdrawal of a plea of guilty upon proof of any grounds set forth in Practice Book § 721. *State v. Collins*, 207 Conn. 590, 597, 542 A.2d 1131 (1988); *State v. Lasher*, 190 Conn. 259, 265, 460 A.2d 970 (1983).

I

The defendant's first claim is that the trial court erred in denying the motions to withdraw his guilty pleas entered pursuant to the *Alford* doctrine because the court failed to inform him of the precise amount of the fines that could be imposed for violations of General Statutes § 53-21, and therefore failed to ensure that the defendant fully understood the maximum possible sentence on the charge, as required by Practice Book § 711 (4).[7] Practice Book § 721 (1) provides that a motion to withdraw a plea of guilty may be granted if "[t]he plea was accepted without substantial compliance with [Practice Book] Sec. 711." Practice Book § 711 (4) requires that the defendant be advised of the maximum possible sentence.

In the present case, the court informed the defendant that fines could be imposed in addition to a maximum penalty of forty years. The court also explicitly reviewed with the defendant the precise sentence that could be imposed in accordance with the parameters of his plea bargain. In addition, the court informed the defendant that if the plea agreements were not followed he would be allowed to withdraw his pleas. Nothing in the plea bargain contemplated a fine. Accordingly, the failure of the trial court to inform the defendant of the precise

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[7] At the hearing on the motions to withdraw his pleas, the defendant argues that the trial court erred in not advising him personally of the mandatory minimum sentence that could be imposed. Practice Book § 711 (2). This claim evades meaningful appellate review because counsel has not briefed this claim. We therefore consider this claim waived. *Czarnecki v. Plastics Liquidating Co.*, 179 Conn. 261, 262 n.1, 425 A.2d 1289 (1779).

amount of the fines that could have been imposed, on the facts of this case, does not constitute defective compliance with Practice Book § 711 (4).

II

The defendant next claims that the court's failure to elicit responses other than "yes" or "no" from the defendant during the canvass of the pleas invalidates his guilty pleas entered pursuant to the *Alford* doctrine. This claim was not raised in the trial court. Ordinarily, the defendant's failure to raise a timely claim of error to the trial court renders the claim unreviewable on appeal. *State v. Badgett*, 200 Conn. 412, 417, 512 A.2d 160 (1986), cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L.Ed. 2d 373 (1986). " 'Only in the most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised or decided in the trial court.' *State v. Evans*, 165 Conn. 61, 69, 327 A.2d 576 (1973). We have recognized, however, as an 'exceptional circumstance' within this doctrine, certain claims involving colorable deprivations of fundamental constitutional rights." *State v. Badgett*, supra. To the extent that the defendant's claim implicates the failure of the trial court to ensure that the defendant's pleas were entered voluntarily; see *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); his claim is properly reviewable despite the absence of a timely claim of error before the trial court. *State v. Badgett*, supra, 418; see also *State v. Schaeffer*, 5 Conn. App. 378, 381, 498 A.2d 134 (1985).

Single word responses to court questions at plea taking do not ordinarily render the plea involuntary. *State v.*

Torres, 182 Conn. 176, 178-84, 438 A.2d 46 (1980). *State v. Bugbee*, 161 Conn. 531, 536, 290 A.2d 332 (1971), explicated the standards for reviewing whether single word responses demonstrate that a defendant's plea was entered intelligently, knowing and voluntarily. "To insulate from attack convictions obtained after a plea of guilty, the trial court is best advised to conduct an on-the-record examination of the defendant which will disclose, inter alia, a full understanding of what the plea connotes and of its consequence and which will demonstrate that the plea of guilty was entered intelligently, knowingly and voluntarily." Id. "If a fair reading of the record satisfies the standards set down in *Bugbee*, the guilty plea will withstand a constitutional attack based on facial invalidity." *State v. Torres," supra*, 182. The transcript of the trial court's plea canvass unequivocally demonstrates that the requisite constitutional standards for the acceptance of guilty pleas were met.

The defendant mistakenly relies on rule 11 of the Federal Rules of Criminal Procedure and the cases decided thereunder for the position that single word responses invalidate guilty pleas. But *United States v. Dayton*, 604 F.2d 931, 941-43 (5th Cir. 1979), cert. denied, 445 U.S. 904, 100 S. Ct. 1080, 63 L. Ed. 2d 320 (1980), makes clear that single word responses do not necessarily render guilty pleas constitutionally infirm. Moreover, federal cases construing and applying rule 11 "are of persuasive . . . not controlling, authority." *State v. Godek*, 182 Conn. 353, 359, 438 A.2d 114 (1980), cert. denied, 450 U.S. 1031, 101 S. Ct. 1741, 68 L. Ed. 2d 226 (1981).

III

The defendant next claims that the trial court erred in denying his motions to withdraw his guilty pleas entered pursuant to the *Alford* doctrine because it refused to find that the defendant's pleas resulted from the denial of the effective assistance of counsel without holding an evidentiary hearing.[8] Citing Practice Book § 721 (4), which provides for withdrawal of guilty pleas on the ground of ineffective assistance of counsel, the defendant urges this court to remand this issue to the trial court for an evidentiary hearing.

Generally, " 'a claim of ineffective assistance of counsel is more properly pursued on a petition for new trial or on a petition for a writ of habeas corpus rather than on direct appeal.' " *State v. Leecan*, 198 Conn. 517, 541, 504 A.2d 480, cert. denied, 476 U.S. 1184 S. Ct. 2922, 91 L. Ed. 2d 550 (1986), *State v. Mason*, 186 Conn. 574, 578-79, 442 A.2d 1335 (1982). "It is preferable that all of the claims of ineffective assistance, those arguably supported by the record as well as others requiring an evidentiary hearing, be evaluated by the same trier in the same proceeding," *State v. Leecan*, supra. *Leecan*, however, did not address the precise issue in this case, namely, whether the trial

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[8] The court stated that: "The record [of the plea canvass] is replete with the questioning by this court of your client concerning the advice of his counsel and the satisfaction of that advice. And the record certainly shows his answers to those questions were appropriate and he acknowledged that he was satisfied with the advice of his attorney and that he was following that advice."

court erred in declining to hold an evidentiary hearing on the question of whether a defendant's pleas entered pursuant to the *Alford* doctrine resulted from the denial of effective assistance of counsel under the provisions of Practice Book § 721 (4). The transcript of the hearing on the motions to withdraw the pleas indicates that the trial court was aware of the distinction between the *Leecan* preference and the grounds of ineffective assistance of counsel as a basis for withdrawal of guilty plea pursuant to Practice Book § 721 (4).[9]

At the hearing on the motions to withdraw his pleas, the defendant argued that his attorney did not inform him of the collateral consequences of entering guilty pleas pursuant to the *Alford* doctrine, thereby rendering his pleas involuntary. Cf. *North Carolina v. Alford*, 400 U.S. 25, 29 n.3, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1979). The defendant contends that his attorney should have informed him that his *Alford* pleas would constitute admission against interest in collateral civil proceedings initiated by the victims' families, whereas pleas of nolo contendere would not.

Although the defendant's attorney may not have informed the defendant of the collateral consequences, if any, of entering guilty pleas pursuant to the *Alford* doctrine, as opposed to pleas of nolo contendere, only where "such allegations furnish a basis for withdrawal of the

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[9] The court stated to the defendant's attorney that: "Some of the things you mentioned, Mr. Williams, may very well be matters that can be brought up on a habeas corpus action. You might even want to take an appeal on my refusal to allow you to withdraw the pleas."

plea under § 721 and are not conclusively refuted by the record of the plea proceedings and other information contained in the court file, [is] an evidentiary hearing . . . required." (Footnote omitted.) *State v. Torres*, supra, 185-86.

The defendant's allegation that he was denied the effective assistance of counsel because counsel did not inform him of the collateral consequences of his pleas in a civil proceeding does not constitute a basis for withdrawal of the plea under § 721(4). A guilty plea under the *Alford* doctrine is a "judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." *State v. Palmer*, 196 Conn. 157, 169 n.3, 491 A.2d 1075 (1985). In *North Carolina v. Alford*, supra, the United States Supreme Court treated such guilty pleas as the "functional equivalent" of a plea of nolo contendere. *State v. Palmer*, supra n.3; *State v. Pena*, 16 Conn. App. 518, 533, 548 A.2d 445 (1988). "A plea of nolo contendere has the same legal effect as a plea of guilty on all further proceedings *within the indictment*. . . . The only practical difference is that the plea of nolo contendere may not be used against the defendant as an admission in a subsequent criminal or civil case." (Emphasis added; citations omitted.) *State v. Martin*, 197 Conn. 17, 20-21 n.7, 495 A.2d 1028 (1985). As a guilty plea under the *Alford* doctrine is the "functional equivalent" of a plea of nolo contendere, an *Alford* plea may not be used against the defendant as an admission in a subsequent civil case. *State v. Pena*, supra. Accordingly, as a matter of law, the defendant

cannot maintain the foregoing as a basis for withdrawal of the plea under § 721 (4). *State v. Torres*, supra, 185-90.

Further, the record of the plea proceeding conclusively establishes that the defendant's pleas pursuant to the *Alford* doctrine were entered knowingly, intelligently and voluntarily. "[F]or a plea to be knowing and intelligent, the record must show that the federal constitutional standards were satisfied . . . and that there was substantial compliance with Practice Book § 711 . . . . There is no requirement, however, that the defendant be advised of every possible consequence of such a plea." (Footnote and citations omitted.) *State v. Gilnite*, 202 Conn. 369, 383, 521 A.2d 547 (1987). The record of the plea proceedings demonstrates that the federal constitutional standards were satisfied and that there was substantial compliance with Practice Book § 711. The defendant's claim that his pleas were not knowing and voluntary because counsel failed to inform him of the nonexistent collateral consequences of his *Alford* plea is therefore without merit. Accordingly, the trial court did not err in failing to hold an evidentiary hearing on this issue.

IV

The defendant next argues that his pleas of guilty entered pursuant to the *Alford* doctrine were involuntary because the state failed, before the defendant entered his pleas, to disclose information about a potential state's witness, namely, that the witness was in state custody and therefore any testimony by him could have been

subject to state influence.[10] The crux of the defendant's claim appears to be that, but for the omission of this information, the defendant would not have pleaded guilty under the *Alford* doctrine because this information could have been used to impeach the state's witness at trial.

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court stated that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." "Impeachment evidence as well as exculpatory evidence falls within *Brady's* definition of evidence favorable to an acccused. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Brady v. Maryland*, supra, 87; *United States v. Polizzi*, 801 F.2d 1543, 1553 (9th Cir. 1986)." *State v. Pollitt*, 205 Conn. 132, 142, 531 A.2d 125 (1987). "[E]vidence required to be disclosed must be disclosed at a time when it can be used." *State v. Pollitt*, 199 Conn. 399, 414, 508 A.2d 1 (1986), on remand, 205 Conn. 132, 531 A.2d 125 (1987).

The defendant is not entitled to impeachment evidence about a state's witness *until* the witness has been

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[10] The state, at the hearing on the motions to withdraw the defendant's pleas, stated that the "witness" would not have been used as a prosecution witness "under any circumstances in any event." The state also claimed that the defendant was aware of the witness, and that the defendant knew the witness was in the custody of the state.

called by the state and has testified on direct examination. Practice Book § 744.[11] Here, the witness was obviously never called to testify by the state, and therefore the defendant was not entitled to information about the criminal "charges pending against the witness known to the prosecuting attorney." Id. The claimed *Brady* material sought by the defendant could not have been used unless, and until, the witness was called to testify. Accordingly, the state had no obligation to disclose the information before the defendant entered his pleas of guilty pursuant to the *Alfred* doctrine. As the defendant was not entitled to this information until trial, the unavailability of the information did not render the defendant's pleas of involuntary.

V

Relying on federal cases, the defendant finally claims that the trial court should have permitted the withdrawal of his pleas because the state would not have suffered any prejudice from their withdrawal. The federal standard for presentence withdrawal motions, derived from dictum in *Kercheval v. United States*, 274 U.S. 220, 224, 47

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[11] "[Practice Book] Sec. 744. [DISCLOSURE BY THE PROSECUTING AUTHORITY – DISCLOSURE AT JUDICIAL DISCRETION] ___ ___ PRIOR RECORD OF WITNESSES

"After a witness called by the state has testified on direct examination, the prosecuting authority shall disclose any record of felony convictions of the witness known to the prosecuting authority and any record of felony or misdemeanor charges pending against the witness known to the prosecuting authority."

S. Ct. 582, 71 L. Ed. 1009 (1927), is any "fair and just" reason. The fair and just reason test has received different interpretations.[12] The prevailing view in the federal courts, however, as stated in *United States v. Saft*, 558 F.2d 1073, 1083 (2d Cir. 1977), is that there is no occasion to inquire into the matter of prejudice unless the defendant first shows a sufficient reason for being allowed to withdraw his plea.[13] We are persuaded by that view. Although a trial court may, in the exercise of its discretion, consider whether the state will suffer any prejudice in the event that the plea is withdrawn, that consideration does not eliminate the requirement that the defendant must first show a basis for withdrawing the guilty plea under Practice Book § 721. As demonstrated by parts I through IV of this opinion, the defendant failed to make that showing.

There is no error.

In his opinion the other judges concurred.

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[12] The minority view is represented by *United States v. Savage*, 561 F.2d 554, 556 (4th Cir. 1977)(any desire to withdraw the plea before sentence suffices so long as the prosecution fails to establish that it would be prejudiced by the withdrawal).

[13] See Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure (6th Ed. 1986) P. 1239.

State of Connecticut *v.* Anthony Rish

The defendant's petition for certification for appeal from the Appellate Court, 17 Conn. App. 447, is denied.

John R. Williams, in support of the petition.

Mitchell S. Brody, in opposition.

Decided April 13, 1989

Supreme Court, U.S.
FILED
MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2008

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

ANTHONY RISH,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a state procedural rule requires that the prosecution disclose impeachment evidence to a defendant only after a witness has testified on direct examination, is a defendant's Alford plea "unintelligent" when the defendant was aware that the witness was in police custody and the state represents at the plea proceeding its intention not to call the witness under any circumstances?

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OPINION BELOW

The opinion of the Appellate Court of Connecticut is reported at 17 Conn. App. 447, 553 A.2d 1145 (1989).

A timely petition for certification was denied by the Connecticut Supreme Court on April 13, 1989, and is reported at 211 Conn. 802 (1989).

JURISDICTION

The judgment of the Appellate Court of Connecticut was entered on February 7, 1989. A petition for certification was denied by the Connecticut Supreme Court on April 13, 1989. The petition for writ of certiorari was filed on June 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

[N]or shall any State deprive any person of life, liberty, or property, without due process of law....

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 17.1

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) ...

(b) When a state court of last resort has decided a federal

question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Connecticut Practice Book § 744

After a witness called by the state has testified on direct examination, the prosecuting authority shall disclose any record of felony convictions of the witness known to the prosecuting authority and any record of felony or

misdemeanor charges pending against a witness known to the prosecuting authority.

STATEMENT OF THE CASE

In two companion cases, the petitioner pled guilty under North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970), to a total of two counts of sexual assault in the second degree and two counts of risk of injury to a minor. After obtaining new counsel and before sentencing, the petitioner sought to withdraw his pleas, contending, inter alia, that they were rendered "unknowing" or "unintelligent" by the state's failure to disclose that a potential state's witness was in police custody.

At the plea withdrawal hearing, the petitioner argued that he would not have

acknowledged the strength of state's case and pled guilty pursuant to the Alford doctrine if this impeachment evidence been divulged. The state responded that it had not intended to call this potential witness to testify if there had been a trial, and that the impeachment evidence at issue had been disclosed to the petitioner and was available when the guilty pleas were entered.[1] The trial court denied the petitioner's plea withdrawal request.

The Appellate Court upheld the trial court's refusal to allow the petitioner to withdraw his guilty pleas. According to the Court, impeachment evidence which is required to be

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[1]. On appeal, the state indicated that it had turned over the impeachment evidence in its response to the petitioner's discovery motion.

disclosed under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), and its progeny; see United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972); must be disclosed at a time when it can be used. 17 Conn. App. at 458; Petitioner's Appendix at A 14. The Court observed that under Connecticut Practice Book § 744, the petitioner was only entitled to the "claimed Brady material"--the pending charges against a potential state witness--after that witness had testified on direct examination. 17 Conn. App. at 458; Petitioner's Appendix at A 14-15. The Court reasoned that this impeachment evidence could not have been used until the time of trial, and that disclosure on the part of the state was

not obligatory prior to trial, before a criminal defendant enters a guilty plea pursuant to the Alford doctrine. Id.

REASONS FOR DENIAL OF THE PETITION

1. The petitioner misstates the facts of this case

The petitioner's argument is premised on the assertion that the state, in response to his discovery motion, failed to disclose that there were pending charges against a potential state's witness. This assertion is factually incorrect because prior to the petitioner's guilty pleas, the state, in its Answer to the Defendant's Motion for Discovery, had disclosed that the potential witness was in police custody. In addition, as the Appellate Court noted, the prosecutor represented at the hearing on the plea withdrawal request that the petitioner's first counsel had

been apprised of this information. 17 Conn. App. at 457 n.10.; Petitioner's Appendix at A 14 n.10. The petitioner was not deprived of the claimed Brady material when he assessed the state's evidence and pled guilty under the Alford doctrine. Consequently, certiorari review would be inappropriate for this fact-bound, inaccurate claim.

2. The Appellate Court's refusal to allow the withdrawal of the petitioner's guilty pleas was not violative of the due process clause

This Court has not considered whether the due process clause of the fourteenth amendment requires that the state disclose impeachment evidence prior to a criminal defendant pleading guilty under the Alford doctrine. Among the federal courts, only the Eighth Circuit has addressed the specific issue of what type of information must the

state furnish to the accused in order to ensure that his Alford plea is "knowing" and "intelligent." In White v. United States, 858 F.2d 416 (8th Cir. 1988), the Court concluded that the due process clause requires the state to disclose exculpatory evidence which would be "`controlling in the decision to plead'" under the Alford doctrine. Id. at 424, quoting Campbell v. Marshall, 769 F.2d 314, 324 (6th Cir. 1985), cert. denied, 475 U.S. 1048, 106 S.Ct. 1268 (1986) (establishing the same disclosure requirement for guilty pleas that admit to the commission of the charged offense).

a. There is no evidence in the record connecting the potential witness to this case

In the present case, even if the assumption is made that the state did

not disclose that a potential witness was in police custody, there is no indication in the record that this information would be controlling for purposes of the petitioner's Alford plea. Although the petitioner asserts that the Appellate Court deemed the information at issue to be exculpatory; Petition at 4; it was characterized in the opinion simply as the "claimed Brady material." 17 Conn. App. at 458; Petitioner's Appendix at A 15. Importantly, the petitioner has never suggested how the potential witness is connected to this case. Scrutiny of the information that was disclosed to the petitioner during discovery reveals that the potential state's witness was the brother of one of the victim's of the crimes charged, and that he allegedly

molested two other victims of those crimes. However, there is no evidence that this individual knew anything about the crimes committed by the petitioner. There is no support in the record for the petitioner's unsupported contention that the potential state's witness would have been an "important" witness. Petition at 4. It is for this reason that the state represented at the plea withdrawal hearing that it never intended to call this individual to testify at trial. 17 Conn. App. at 457 n.10; Petitioner's Appendix at A-14 n.10. If anything, the victims of the crimes charged would have been the state's key witnesses at trial. Evidence that would have called into question the credibility of another witness, whose connection to the crimes charged is

uncertain, reasonably could not have undermined the strength of the state's case or dissuaded the petitioner from pleading guilty. White, 858 F.2d at 424. Therefore, certiorari review is unwarranted because, under the facts of this case, the petitioner's plea was not rendered "unknowing" or "unintelligent" by the unavailability of information that a potential state's witness was in police custody.

b. Due process does not mandate the disclosure of general impeachment evidence prior to an accused pleading guilty under the Alford doctrine.

Assuming, arguendo, that the testimony of the potential witness would have played an important part in the state's case against the petitioner, the Appellate Court's determination that pending charges against this witness

need be disclosed only after his testimony on direct examination, as is required by Connecticut Practice Book § 744, implicitly and correctly recognizes that full disclosure of Brady material for purposes of a trial is not a necessary predicate for an "intelligent" plea pursuant to the Alford doctrine. See United States v. Wolczk, 480 F.Supp. 1205, 1211 (W.D. Pa. 1979) (court reluctant to require disclosure of all Brady material as a prerequisite to entering plea negotiations, but proscribes the state from misrepresenting its case to the accused in order to secure an admission of guilt). Although the defendant raises the general argument that this Practice Book provision would preclude adequate preparation by defense counsel prior to

cross-examination; see Petition at 6; trial preparation is not at issue in this case because the defendant elected to plead guilty instead of going to trial.

Pending charges against a witness whose testimony may well be determinative of guilt or innocence would fall under the rule of Brady because of the suggestion that that witness was susceptible to the influence of the state. Giglio, 405 U.S. at 154-55. Yet, impeachment evidence which may affect a witness' general credibility would seldom be controlling for purposes of deciding whether to plead guilty under the Alford doctrine. The impact of impeachment evidence at trial "cannot be answered with certitude..." See McMann v. Richardson, 397 U.S. 759, 770, 90

S.Ct. 1411 (1970). "The decision to plead guilty before the evidence is in frequently involves the making of difficult judgments." Id. at 769. Only the availability of information that would directly contradict an important witness' testimony on the elements of the crime charged has the potential for being controlling when the question of pleading guilty is weighed by the accused. Fambo v. Smith, 433 F.Supp. 590, 598 (W.D.N.Y. 1977), aff'd, 565 F.2d 233 (2d Cir. 1977) (prosecutor has a duty to disclose during plea bargaining evidence that is exculpatory of the elements of the crime charged). Here, the pending charges against the potential state's witness would have a bearing only on his general credibility. Certiorari review should be denied

because, prior to plea negotiations, the due process clause does require that the state disclose this type of impeachment information.

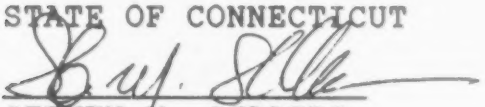
CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

THE RESPONDENT

STATE OF CONNECTICUT

BY: 

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